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No. 96-601

In The

Supreme Court of the United States

October Term, 1996

RISSLER & MCMURRY CO.,
a Wyoming corporation,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

On Petition For Writ Of Certiorari To The Wyoming Supreme Court

BRIEF IN OPPOSITION

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STATUTES AND REGULATIONS INVOLVED

Wyo. Stat. § 35-11-1001(b).

Wyoming Rules of Civil Procedure, Rule 12.

Wyoming Department of Environmental Quality Rules of Practice and Procedure, Chapter VII, Section 11(e)(ii).

STATEMENT OF JURISDICTION

Petitioner Rissler & McMurry Co. filed its Petition For Writ of Certiorari on October 11, 1996. Rissler & McMurry Co. cites *28 U.S.C. § 1257* and *Rule 10(e) of the Rules of the United States Supreme Court* as authority for the Court to review, through a writ of certiorari, the decision of the Wyoming Supreme Court, issued June 5, 1996, rehearing denied July 16, 1996. There is no *Rule 10(e) of the Rules of the United States Supreme Court*. Thus, it appears Rissler & McMurry Co. seeks review pursuant to *Rule 10(c)*, which provides that the Court may review this matter if it determines that the Wyoming Supreme Court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE

Respondent State of Wyoming (Wyoming) is not satisfied with Rissler & McMurry Co.'s statement of the case. Wyoming offers in its place the statement of facts contained in the opinion of the Wyoming Supreme Court. *Rissler & McMurry Co. v. State of Wyoming*, 917 P.2d 1157, 1159-60 (Wyo. 1996); Petition, Appendix A, pp. 17-20.

In addition, Wyoming identifies Rissler & McMurry Co.'s misstatements of fact and law below, pursuant to *United States Supreme Court Rule 15.2*. Rissler & McMurry Co. implies these facts have a bearing on the issues properly before this Court. While Wyoming questions whether these allegations have any bearing, we address the misstatements to preserve the right to challenge the allegations.

Rissler & McMurry Co. mischaracterizes the Wyoming Supreme Court's decision by stating that it relied on facts not found in the record on appeal. Petition, p. 3. Rissler & McMurry Co. refers to its Petition For Rehearing before the Wyoming Supreme Court, where it sets forth in detail three matters the Court considered which are allegedly outside the record. Petition Appendix C, p. 45. Each of these matters is, in fact, supported by the record on appeal. The first is located in the Complaint, R. 3C, ¶ 15; Petition Appendix E, p. 63; the second is located at R. 236; and the third matter which Rissler & McMurry Co. alleges is not in the record is located in the Complaint, R. 4-5, ¶¶ 21 and 24; Petition, Appendix E, p. 64.

REASON TO DENY PETITION

THE WYOMING SUPREME COURT FOLLOWED *WILLIAMSON* IN HOLDING THAT RISSLER & McMURRY CO. MUST EXHAUST ADMINISTRATIVE REMEDIES

Rissler & McMurry Co. seeks review of the Wyoming Supreme Court's decision in *Rissler & McMurry Co. v. State of Wyoming*, alleging it conflicts with this Court's decisions. It is important that this Court understand from

the outset that this case is not one of misapplication of any decision of this Court. Rather, it is simply and purely a matter of Rissler & McMurry Co.'s own refusal to exhaust available remedies; nothing more. The Wyoming Supreme Court affirmed the First Judicial District Court's decision, both of which held that Rissler & McMurry Co.'s claim was not ripe because Rissler & McMurry Co. failed to exhaust administrative remedies to establish a taking and failed to follow procedures designed to compensate it for an alleged taking. 917 P.2d at 1160-1.

The Wyoming Supreme Court's opinion is indeed consistent with this Court's decisions. *Rissler & McMurry Co.*, 917 P.2d at 1161-2, citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194-95 (1985). This Court has already stated it would deny review if the petitioner failed to exhaust its remedies and the State's highest court made its decision based on that principle. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1011-1012, 1029 (Kennedy concurrence) (1992); *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 787 P.2d 907 (en banc), *cert. denied*, 498 U.S. 911 (1990).

It is undisputed that Rissler & McMurry Co., of its own volition, withdrew its application for a permit prior to the Wyoming Environmental Quality Council's final decision. Petition, p. 9. Rissler & McMurry Co. cannot know whether Wyoming would have "taken" its property until Wyoming is provided the opportunity to make a final decision. Rissler & McMurry Co.'s voluntary withdrawal of its application prior to final action by the Wyoming Environmental Quality Council deprived Wyoming of any opportunity to render such a final decision.

Thus, the Wyoming Supreme Court correctly held that Rissler & McMurry Co.'s takings claim was not ripe.

In the Wyoming Supreme Court, Rissler & McMurry Co. contended that it should not be required to exhaust its remedies, based upon the allegation that to do so would have been futile. However, nothing in the record supports its erroneous assertion. The Wyoming Supreme Court properly rejected that very argument because the facts, as alleged by Rissler & McMurry Co. in its complaint, do not meet the substantial burden necessary to overcome "the strong public policies favoring the exhaustion doctrine." *Rissler & McMurry Co.*, 917 P.2d at 1162, citing *Presbytery of Seattle, supra*, 787 P.2d at 916-17.[1]

RESPONSE TO RISSLER & McMURRY CO.'S REASONS

THE WYOMING SUPREME COURT'S DECISION TO AFFIRM THE TRIAL COURT'S ORDER GRANTING THE MOTION TO DISMISS IS CONSISTENT WITH THIS COURT'S DECISIONS.

The Wyoming District Court properly dismissed Rissler & McMurry Co.'s complaint on the basis that Rissler & McMurry Co. failed to exhaust its administrative remedies. Petition, Appendix B, p. 35. Rissler & McMurry Co. argues its takings claim cannot be dismissed under

[1] Petitioner suggests the Wyoming Environmental Quality Council proceeded with a strategy designed to never reach a final decision. Yet, Petitioner admits the Council had scheduled a hearing in April of 1994, which was never held because Petitioner withdrew its permit application before the hearing. Petition, p. 8.

Wyoming Rules of Civil Procedure, Rule 12(b)(6), because takings claims are "uniquely fact specific". This issue appears to be presented for the first time in Rissler & McMurry Co.'s Petition For Rehearing. Petition, Appendix C. This Court could deny review on that basis alone. *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

Even if Rissler & McMurry Co. properly raised this issue for certiorari, it presents no cogent argument to support its position. In support of this argument, the Rissler & McMurry Co. cites *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), and *Lucas.* Wyoming is unable to find Rissler & McMurry Co.'s proposition stated in the cited cases, or any other case.

Rissler & McMurry Co.'s argument defies logic, given the foundation of the order dismissing this case. Pursuant to the *Wyoming Rules of Civil Procedure, Rule 12(b)(6),*[2] Wyoming essentially admitted, for purposes of the motion, the material factual allegations of the complaint, nonetheless contending that the Rissler & McMurry Co. was not entitled to relief under the facts alleged in support of the claim. *Hospital Building Co. v. Trustees of the Rex Hospital,* 425 U.S. 738 (1976); *Carbon County School District No. 2 v. Wyoming State Hospital,* 680 P.2d 773 (Wyo. 1984). Since the facts, as Rissler & McMurry Co. pleaded them, failed to state a claim, it was just as appropriate to dismiss Rissler & McMurry Co.'s takings claim as any other. Neither *Lucas,* nor any other

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[2] *Rule 12(b)(6) of the Wyoming Rules of Civil Procedure* is identical to *Rule 12(b)(6) of the Federal Rules of Civil Procedure.*

opinion of this Court forbids application of Rule 12 to a complaint alleging an unconstitutional taking. In fact, this Court has denied certiorari under these very circumstances. See, e.g., *Presbytery of Seattle, cert. denied*, 498 U.S. 911 (1990).

RISSLER & McMURRY CO. PRESENTS AN ISSUE OF STATE LAW WHICH WAS NOT RAISED BEFORE OR DECIDED BY THE WYOMING SUPREME COURT

Rissler & McMurry Co. argues it has challenged a rule promulgated by the Wyoming Environmental Quality Council as invalid on its face.[3] Rissler & McMurry Co. argues that by doing so it is not obligated to exhaust administrative remedies, according to this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992). The basis for Rissler & McMurry Co.'s challenge is its allegation that the Wyoming Environmental Quality Council's enabling legislation does not authorize it to promulgate the rule. Petition, p.11.

Statutory authority to promulgate rules is an issue of state law, which the Wyoming Supreme Court has not addressed because Rissler & McMurry Co. raised the issue for the first time on appeal. *Rissler & McMurry Co.*, 917 P.2d at 1162, fn.1. Thus, this Court should not decide this question. *28 U.S.C. 1257(a); Lear, Inc. v. Adkins*, 395 U.S. 653, 674-5 (1969); *Uphaus v. Wyman*, 360 U.S. 72, 75 (1959).

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[3] Petitioner challenges *Wyoming Department of Environmental Quality Rules of Practice and Procedure, Chapter VII, Section 11(e)(ii)*. Respondent has attached as Appendix A pertinent provisions from this chapter, including the provision in question, which is highlighted for the Court's convenience. App. 3.

Further, Rissler & McMurry Co. did not allege in the trial court that the rule is invalid on its face. Its complaint only challenged the rule as applied to Rissler & McMurry Co.. Petition, Appendix E, pp. 62-64, ¶¶ 13, 15, 18, and 19. In *Yee*, this Court held that an allegation in a complaint of facial invalidity is not rendered unripe on the ground of complainants's failure to exhaust remedies. 503 U.S. at 533. Here, since Rissler & McMurry Co.'s complaint challenged the rule, only as applied to it, the claim cannot survive.

THE WYOMING SUPREME COURT'S DECISION REQUIRING RISSLER & McMURRY CO. TO FOLLOW WYOMING PROCEDURE IS CONSISTENT WITH THIS COURT'S DECISIONS.

The Wyoming Supreme Court required Rissler & McMurry Co. to follow Wyoming procedures to pursue its taking claim. *Rissler & McMurry Co.*, 917 P.2d at 1161-62. Rissler & McMurry Co. cites *Lucas* and *Yee* in support of the argument that Wyoming cannot procedurally limit Rissler & McMurry Co.'s ability to pursue a takings claim by requiring it to seek compensation through *Wyo. Stat. § 35-11-1001(b)*. Petition, p. 14.

Neither *Lucas* nor *Yee* stand for the proposition that a State cannot establish procedures through which Rissler & McMurry Co. would be compensated for an alleged taking. As the Wyoming Supreme Court pointed out, this Court has decided that States can establish such procedures and that a takings claim is not ripe until the complainant seeks compensation through those procedures. *Williamson County Regional Planning Commission,*

473 U.S. at 194-95; *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 297 (1981). Rissler & McMurry Co. has not done so.

CONCLUSION

Petitioner Rissler & McMurry Co. has failed to demonstrate any reason under *28 U.S.C. 1257 or Rule 10 of the Supreme Court Rules* for this Court to consider this case. There is no divergence between the Wyoming Supreme Court's decision and the decisions of this Court. Rather, the Wyoming Supreme Court has explicitly relied upon the law as established by this Court. The Court applied State law precisely as directed by this Court.

The bottom line is that Rissler & McMurry Co. withdrew its application before Respondent State of Wyoming could act, thereby refusing to exhaust its remedies. Under such circumstances, this Court should deny Rissler & McMurry Co.'s Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

CHAPTER VII

DESIGNATION OF AREAS PURSUANT TO W.S. § 35-11-112(a)(v)

Section 11. Criteria for Designation.

(a) In considering designations, the Council shall follow a two-tiered review process. First, the Council must determine whether the area is eligible for designation by virtue of the existence of one or more of the particular values specified in the statute. Secondly, the Council must determine whether any particular value that is found to exist is very rare or uncommon.

(b) For an area to be eligible for designation, the Council must make an initial finding that the area at issue possesses particular historical, archaeological, wildlife, surface geological, botanical or scenic value. For purposes of making the initial finding, or refusing to make the initial finding, the Council shall consider the significance and the weight of all specifically identified factors that are set forth in these criteria.

(c) For purposes of determining whether an area of the State may be considered to have particular historical, prehistorical, or archaeological value the Council shall consider the following factors:

(i) Whether the area is mentioned prominently in historic journals or other historic literature;

(ii) Whether the area is important because it is associated with cultural or religious traditions and practices;

(iii) Whether the area has received designation pursuant to state or federal laws that provide for special protection and management due to outstanding historic or prehistoric values such as national historic landmarks, national historic sites, or the National Register of Historic Places; or

(iv) Whether the area contains buildings, structures, artifacts, or other features that are significant in the history or prehistory of the state.

(d) For purposes of determining whether an area has particular wildlife value the Council shall consider the following factors:

(i) Whether the area includes lands that are considered irreplaceable fish or wildlife habitat;

(ii) Whether the area includes preserves or easements which have been established and used for the protection for habitat for wildlife;

(iii) Whether the area includes lands that the Game and Fish Department has designated as crucial or vital habitat for resident species;

(iv) Whether the area contains or may affect fisheries classified as class I by the Wyoming Game and Fish Department;

(v) Whether the area includes fragile lands that offer unique wildlife or scientific values;

(vi) Whether the area includes federally designated critical habitat for threatened or endangered plant or animal species which is determined by the U.S. Fish and Wildlife Service or the Wyoming Game and Fish

Department to be of essential value and where the presence of threatened or endangered species has been scientifically documented;

(vii) Whether the area contains a bald or golden eagle nest or nest site that is determined to be active and includes all or a portion of a buffer zone of land around the nest which has been evaluated and approved by the U.S. Fish and Wildlife Service;

(viii) Whether the area includes bald and golden eagle roost and concentration areas used during migration and wintering;

(ix) Whether the area contains a falcon (excluding kestrel) cliff nesting site with an active nest and a buffer zone around the nest site which has been evaluated and approved by the U.S. Fish and Wildlife Service; or

(x) Whether the area includes lands which are high priority habitat for migratory birds of high federal interest on a regional or national basis as determined by the U.S. Fish and Wildlife Service.

(e) For purposes of determining whether an area has particular surface geological value the Council shall consider the following factors:

(i) Whether the area has unique surface geological formations that expose upheavals and faults that are indicative of sub-surface geological features;

(ii) Whether the area has significant paleontological resources; or

(iii) Whether the area has geologic features with unusual or substantial recreational, aesthetic, or scientific value.

(f) For purposes of determining whether an area has particular botanical value the Council shall consider the following factors:

(i) Whether the area is critical habitat for endangered or threatened plant species as designated by state or federal agencies;

(ii) Whether the area contains stands of a rare native vegetation type, or contains stands of a native vegetation type that is now rare, or contains stands of a native vegetation type in pristine condition for which pristine stands are unusual; or

(iii) Whether the area contains plant species and habitat determined to be crucial or vital for resident wildlife species.

(g) For purposes of determining whether an area has particular scenic value the Council shall consider the following factors:

(i) Whether the area incudes lands within or adjacent to a corridor for a river designated as a National Wild and Scenic River or a corridor for a National Scenic Byway;

(ii) Whether the area has been the subject of substantial artistic attention in the works of artists, sculptors, photographers, or writers; or

(iii) Whether the area has substantial aesthetic value and its value would be apparent to a reasonable person.

(h) An area shall be designated pursuant to W.S. § 35-11-112(a)(v) if, in addition to finding that the area is eligible for designation pursuant to Section 11.a., the Council finds that the area is very rare or uncommon. For purposes of determining if an area is very rare or uncommon the Council shall consider the following:

(i) Whether the area exhibits historical, archaeological, wildlife, surface geological, botanical, or scenic values that are very rare of [sic] uncommon when compared with other areas of the state or a region therein;

(ii) Whether the area contains historical, archaeological, wildlife, surface geological, botanical, or scenic values seldom found within the state or a region therein; or

(iii) Whether the area contains historical, archaeological, wildlife, surface geological, botanical, or scenic values known or suspected to be declining which, if left unprotected, could become extinct or extirpated.